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Supreme Court, U.S.
FILED
JUN 29 1993
OFFICE OF THE CLERK

No. 92-1956

In The

Supreme Court of the United States

October Term, 1992

CONSOLIDATED RAIL CORPORATION,

Petitioner,

v.

JAMES E. GOTTSHALL and ALAN CARLISLE,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

RESPONDENT JAMES E. GOTTSHALL'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Did the court of appeals in *Gottshall v. Consolidated Rail Corporation* act properly in basing its decision upon an exacting scrutiny of the circumstances and common law developments?

2. In assessing common law developments, did the court of appeals in *Gottshall v. Consolidated Rail Corporation* act properly in declining to bind itself by any single state common law emotional injury test and in otherwise refusing to make broad pronouncements of law?

PARTIES TO THE PROCEEDING

This petition involves two cases decided by the United States Court of Appeals for the Third Circuit. The parties to *Gottshall v. Consolidated Rail Corporation*, in respect of which this Brief in Opposition is submitted, are James E. Gottshall, an adult citizen and resident of the Commonwealth of Pennsylvania, and Consolidated Rail Corporation, a publicly-held corporation. Mr. Gottshall is the plaintiff in the district court and was the successful appellant in the court of appeals. Consolidated Rail Corporation is the defendant in the district court and was the unsuccessful appellee in the court of appeals.

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RESPONDENT JAMES E. GOTTSHALL'S BRIEF IN OPPOSITION

In seeking certiorari in the instant cases, petitioner hopes for the opportunity to persuade this Court to graft onto the Federal Employers' Liability Act ("FELA") some form of all-encompassing state common-law-style "test" capable of foreseeing and fitting the myriad of factual situations potentially resulting in emotional injury. In short, petitioner hopes to lure this Court onto the same precipitous path heretofore followed by those state courts which have promulgated the patchwork of artificial paradigms whose irrationality and inconsistency have led to the very "confused, confounded, and sharply divided"

state of the law upon which petitioner purports to found its claim.

Petitioner fails utterly to grasp the wisdom of this Court's opinion only six years ago in *Atchison, Topeka & Santa Fe Ry. Co. v. Buell*, 480 U.S. 557 (1987), wherein this Court wisely recognized the innumerable contexts in which emotional injuries may arise and declared that, "broad pronouncements in this area may have to bow to the precise application of developing legal principles to the particular facts at hand." 480 U.S. at 570. Respondent suggests that this Court does not need to revisit the issues addressed in *Buell*, and that all that is necessary to clear up any conflict over how to address emotional injury cases under the FELA is for this Court, in denying certiorari, to repeat its above-referenced admonition in *Buell*, and succinctly to point out that "glean[ing] guidance from common-law developments" does not equate to the mechanical application of particular common-law tests, especially when those tests vary from jurisdiction to jurisdiction and, however "carefully drawn," seem to require re-drawing every few years. In short, this Court should reject petitioner's invitation to forge yet another link in the chain of failed "tests" advocated by those who paradoxically believe in judicial prescience but not in the courts' ability to discern legal sufficiency, or its absence, in the cases actually before them.

COUNTERSTATEMENT OF THE CASE

Any understanding of the *Gottshall* case requires a thorough scrutiny of the converging circumstances resulting in Gottshall's mental collapse and institutionalization.[1] These circumstances included: (i) the extreme and unusual working conditions which caused Richard Johns, one of Gottshall's co-workers and close friends, to collapse and die of a heart attack; (ii) Gottshall's exposure to those same extreme conditions, both before and after Johns' death; (iii) Gottshall's intimate and active involvement in Johns' death; and (iv) petitioner's negligent and flagrant disregard of the extreme working conditions to which it exposed Gottshall and his co-workers, both before and after Johns' death.

The first component of the atypically severe working conditions to which petitioner subjected Gottshall and his co-workers was the weather. The day Johns died occurred during one of the most severe heat waves in recent memory. Gottshall's boss, Conrail Track Supervisor William Yetter, admitted to being unable to remember a spell which had been so hot for so long in over forty years. As accurately summarized by the Third Circuit, "On the day of the accident, the temperature was hovering at 97

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[1] Supreme Court Rule 24.1(h) requires the inclusion herein of "all that is material to the consideration of the questions presented." Because this Court has indicated that FELA emotional injury cases should turn on an exacting scrutiny of their facts, *Buell*, 480 U.S. at 568, respondent offers the ensuing detailed review bringing together the discussion set forth throughout the Third Circuit's Opinion. See pages A-2 through A-6 and A-47 through A-50 of petitioner's appendix.

degrees; it was humid; the sun was shining; the field was in the open; and work started at high noon." (A-47).[2] As a result of these conditions, the workers were apprehensive, and they complained repeatedly to their supervisors.

That the weather conditions that day were extreme is admitted by petitioner. Dr. David Deubner, petitioner's Chief Medical Officer, for example, defined "extreme weather conditions" as being "when it's hot, it's humid and the sun is shining," and related Conrail's purported policy of taking special precautions under such conditions: "If people are doing very heavy cardiovascular labor, then it should be slowed down and have longer work breaks, more frequently longer breaks when it gets very hot and humid. . . . that's why when the sun gets too high, you recommend slowing down and having more rest." (A-47, A-48).[3]

Contrary to Conrail's avowed policy of slowing down in the face of extreme weather conditions, however,

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[2] All page references are to petitioner's appendix.

[3] Dr. Deubner also advocated what he referred to as an employee's "safe function capacity," which he explained as the matching of an employee's job to his physical health. (A-48). The conditions faced by Mr. Gottshall's co-workers on the date of the accident, however, were a clear violation of this concept. The man who died, for example, Mr. Johns, was 56 years old, was 5'1/2" tall and weighed 187 pounds, and suffered from high blood pressure, athero or arteriosclerotic cardiovascular disease, and was taking medication. (A-48). And as petitioner knew, many if not most of Mr. Gottshall's other co-workers were overweight, and between fifty and sixty years old. One of them had previously suffered a heart attack. *Id.*

Gottshall's supervisors actually speeded the men up, forcing them to work well beyond their usual pace and, to make matters worse, disallowed scheduled work breaks and discouraged unscheduled breaks. Importantly, all of these actions were in contrast to the usual working conditions to which Mr. Gottshall and his co-workers were normally subjected. As stated by the Third Circuit, "[t]here is . . . evidence that conditions that day were anything but 'ordinary,' much less characterized as negotiated circumstance." (A-53). According to one of Gottshall's co-workers, "[t]he conditions at the Watsontown Secondary on the date of the accident were substantially more severe than the general working conditions associated with the job. The extreme heat and humidity, and the pace of the work, were unbearable." (A-53). Another of Mr. Gottshall's co-workers that day swore that, "[w]orking on a division gang can be strenuous. However, the situation on the date of Mr. Johns' death, involving extreme heat, no breaks, no shade and being pushed very hard, was something different." (A-53, 54). As Mr. Gottshall described it, "It was 97 degrees. It was hot and humid. They put us out there to change rails, push, push, push. . . . I'm not an animal." (A-54).[4]

After two and one half hours of continuous toil under these extreme working conditions, Richard Johns, one of Mr. Gottshall's co-workers, and a close friend of fifteen years, collapsed. Though Johns was pale and

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[4] As Mr. Gottshall understood it, the reason for the accelerated pace of the work notwithstanding the weather conditions was that petitioner had violated a railway safety regulation and knew it was scheduled for a safety inspection.

sweating profusely, supervisor Michael Norvick neither took Johns from the worksite nor sought medical assistance. Indeed, Norvick ordered Johns' co-workers to stop assisting Johns and get back to work. About five minutes after they did so, Johns collapsed a second time. At that point, Gottshall rushed back to Johns, where he confronted a gruesome sight. As described by the Third Circuit, "Johns had turned white; his teeth had been knocked out by the fall; his eyes were rolled back; he was gasping for breath; his heart was fluttering; and saliva was drooling from his mouth." (A-3). For the next forty five minutes, Gottshall desperately administered cardiopulmonary resuscitation, during which he intermittently wept and urged Johns to revive, repeating, "[c]ome on Dick, breathe, breathe." (A-5).[5]

While Gottshall tried to revive Johns, supervisor Norvick was busy speeding along old country roads searching for a place to call for help. Under normal circumstances, Norvick simply could have called for help on his Conrail communications equipment. On the date of Johns' death, however, the equipment was useless because Conrail had taken its Turbotville base station off the air for repairs, without telling anyone. Eventually, Norvick was able to summon help and led a team of paramedics to the remote worksite. By then, of course, it was too late for Johns.

[5] Though supervisor Norvick believed CPR training was a good idea because of the men's ages, Gottshall was the only one at the worksite who had been trained in CPR because petitioner had cancelled a training session set up by the American Red Cross due to the "liability factor."

As Norvick saw it, however, it was not too late to finish the job, and he ordered the men back to work. While Gottshall and the others endeavored to complete their task in the hot sun, Johns' corpse laid in open view on the gravel beside the track and "bake[d] like a potato." (A-54). Even after the work was finished, Norvick required the men to remain at the worksite until the coroner arrived, which was not for a full three hours after Johns' death. (A-52).[6]

The following day, when Gottshall reported to work, he was reprimanded for administering CPR to Johns and, along with his co-workers, sent back to work under the same extreme weather and working conditions that had killed Johns. During this time, Gottshall became increasingly frightened that he would die as Johns had. He started feeling sick and lost his appetite. A few days after John's funeral, Gottshall informed his supervisor he was sick and wanted to go home. As Gottshall recalled the conversation, "I had to explain to him after all of this heat and exhaustion, I'm getting sick and I can't take it, I'm going home and taking a couple of days off, and I just got sick and just couldn't go back anymore." (A-6).

When Gottshall went home, he retreated into his basement, where he was found several days later by his father. Shortly afterward, Gottshall was admitted to the Northwestern Institute of Psychiatry. He remained there

[6] It was the coroner's opinion that Johns died from a heart attack brought on by excessive heat and humidity in conjunction with heavy physical exertion. The coroner also concluded that had Johns received prompt medical attention, his chances of survival would have been materially enhanced.

for three weeks, during which time he was diagnosed as suffering from major depression and post-traumatic stress disorder. In addition to loosing forty pounds, Gottshall suffered suicidal preoccupations, anxiety, sleep onset insomnia, cold sweats, loss of appetite, nausea, physical weakness, repetitive nightmares of the death scene and a fear of leaving his home. Since his discharge, Gottshall has continued to receive out-patient psychological treatment.

Gottshall filed a complaint against petitioner with the United States District Court for the Eastern District of Pennsylvania, raising a claim of negligent infliction of emotional distress under the Federal Employers' Liability Act, 45 U.S.C. Section 51, *et seq*. The district court granted petitioner's motion for summary judgment (A-91 through A-100), primarily on the grounds that Gottshall failed to satisfy the "zone of danger" test adopted by the Pennsylvania Supreme Court. (A-97 through A-100). Inexplicably disregarding virtually the entire factual record relating to petitioner's negligence, the district court also found that Gottshall failed to satisfy the traditional common law tort elements of foreseeability and causation. (A-100 through A-105).

The court of appeals reversed. (A-1 through A-72). Adhering closely to this Court's pronouncements in *Buell*, the court of appeals reviewed in detail the circumstances surrounding Gottshall's emotional collapse and then, recognizing the tension between the anti-fraud policy underlying common law emotional injury tests and the liberal policy of the FELA, charged itself with reconciling that tension by, "discerning the trends and developments in common law and then gauging them according to the

policy underlying FELA, for FELA is at issue here and creates the cause of action." (A-24).

Citing the dynamic remedy created by the FELA and the FELA's departures from common law, the court of appeals concluded that state common law tests are not the *sine qua non* for determining whether and to what extent emotional injury claims are cognizable under the FELA. (A-25 through A-30). Rather, the court of appeals reasoned that the best way to promote the policies underlying both the FELA and the state common law tests was through an exacting scrutiny of the facts to determine whether a plaintiff's claim (i) had a "solid basis" in common law and (ii) satisfied traditional tort elements. Because Gottshall's claim met both burdens, the court of appeals reversed the district court.

REASONS FOR DENYING THE WRIT

This Court should not grant certiorari in the *Gottshall* case because: (1) this Court should not bind the lower courts with rigid tests by which to measure the legal sufficiency of FELA emotional injury claims, as (a) such claims involve an array of tortious activities and resulting injuries whose variety does not lend itself to analysis under any particular test, as is made clear by the unfortunate experience of the state courts, (b) any attempt to bind the courts with narrow mechanistic tests would contravene both the remedial goal of the FELA and the Act's intent to vest the courts with authority to expand the Act's coverage as the state of law develops, and (c) the common law concepts of duty, breach, foreseeability

and cause constitute sufficient analytical "uniformity" against which to measure FELA emotional injury claims and separate the good from the bad; and (2) the Third Circuit Court of Appeals' decision in *Gottshall* was based upon a thoughtful and intensive scrutiny of the circumstances involved and otherwise squares perfectly with the applicable precedents of this Court and the intent of the Federal Employers' Liability Act. Finally, because the *Gottshall* decision turned on its particular facts, certiorari is inappropriate.

I. THIS COURT SHOULD NOT BIND THE LOWER COURTS WITH RIGID "TESTS" OR ABSTRACT RULES OF LAW AGAINST WHICH TO MEASURE THE LEGAL SUFFICIENCY OF FELA EMOTIONAL INJURY CLAIMS.

Only six years ago in *Atchison, Topeka & Santa Fe Ry. Co. v. Buell*, 480 U.S. 557 (1987), this Court wisely recognized that:

> "The question whether 'emotional injury' is cognizable under the FELA is not necessarily an abstract point of law or a pure question of statutory construction that might be answerable without exacting scrutiny of the facts of the case. . . . [W]hether one can recover for emotional injury might rest on a variety of subtle and intricate distinctions related to the nature of the injury and the character of the tortious activity."

480 U.S. at 568. This Court also stated that, "[a]s in other areas of law, broad pronouncements in [the area of FELA

jurisprudence] may have to bow to the precise application of developing legal principles to the particular facts at hand." 480 U.S. at 570. Consistently, because this Court was presented with an incomplete factual record in *Buell*, it was unable to determine the legal sufficiency of respondent's claim.

Petitioner here seeks this Court to put an end to the developing state of common law relating to FELA emotional injury cases and to eschew the view expressed in *Buell* that the legal sufficiency of such claims should rest on a scrutiny of the facts involved in each particular case. In their place, petitioner apparently hopes this Court will promulgate and impose upon the lower courts some sort of narrow, state-common-law-style test against which mechanically to evaluate claims of emotional injury brought pursuant to the FELA. Petitioner argues that such a test is necessary because FELA emotional injury litigation "deserves" a "uniform approach." (Petition at 12). Petitioner is wrong for a number of reasons. First, it would be impossible to devise a test capable of addressing the vast array of tortious activities and resulting injuries giving rise to emotional distress. Second, any exclusionary line drawing would contravene both the remedial goals of the FELA and the Act's intent to vest the courts with authority to expand the Act's coverage concomitant with the evolution of the common law. Third, the common law concepts of duty, breach, foreseeability and cause have proven sufficient tools with which the courts can weed out meritless claims.

As to the first point, emotional injury cases brought in the federal courts under the FELA involve a multitude

of tortious activities. *Carlisle v. Consolidated Rail Corporation*, 990 F.2d 90 (3d Cir. 1993) (unreasonably stressful working conditions); *Ray v. Consolidated Rail Corporation*, 938 F.2d 704 (7th Cir. 1991) (threats, harassment and intimidation by supervisor); *Elliot v. Norfolk & Western Ry. Co.*, 910 F.2d 1224 (4th Cir. 1990) (false accusations, assignment to jobs for which employee was unqualified and physically unable to work); *Holliday v. Consolidated Rail Corporation*, 914 F.2d 421 (3d Cir. 1990), *cert. denied*, 498 U.S. 1090 (1991) (placing employee into position for which he was unqualified, resulting in employee mistakes and near-accident); *Adams v. CSX Transportation, Inc.*, 899 F.2d 536 (6th Cir. 1990) (abuse by supervisor); *Gaston v. Flowers Transportation*, 866 F.2d 816 (5th Cir. 1989) (witnessing crushing death of half-brother); *Netto v. Amtrak*, 863 F.2d 1210 (5th Cir. 1989) (harassment during investigation into alleged improprieties); *Gillman v. Burlington Northern Railroad Co.*, 878 F.2d 1020 (7th Cir. 1989) (witnessing death of co-worker); *Stoklosa v. Consolidated Rail Corporation*, 864 F.2d 425 (6th Cir. 1988) (overwork, ridicule and demotion); *Hammond v. Terminal Railroad Association of St. Louis*, 848 F.2d 95 (7th Cir. 1988) (meritless disciplinary charges, unrealistic work demands and other harassment); *Pierce v. Southern Pacific Transp. Co.*, 823 F.2d 1366 (9th Cir. 1987) (false accusations of intoxication); *Robert v. Consolidated Rail Corporation*, 832 F.2d 3 (1st Cir. 1987) (retaliatory disqualification from job, subjecting employee to unnecessary scrutiny and other harassment); *Taylor v. Burlington Northern Railroad Co.*, 787 F.2d 1309 (9th Cir. 1986) (assault; racial and sexual harassment); *Lancaster v. Norfolk & Western Ry. Co.*, 773 F.2d 807 (7th Cir. 1985) (assault by supervisor); *Althoff v. Consolidated*

Rail Corporation, No. 87-4384, slip op. (E.D. Pa. June 13, 1988) (plaintiff operated crane which killed co-worker); *Amendola v. Kansas City S. Ry. Co.*, 699 F. Supp. 1401 (W.D. Mo. 1988) (fear of contracting work-related disease); *Smolsky v. Consolidated Rail Corporation*, 780 F. Supp. 283 (E.D. Pa. 1991) (sexual harassment); *Bloom v. Consolidated Rail Corporation*, No. 89-7452, slip op. (E.D. Pa. February 4, 1993) (plaintiff operated train which struck and killed pedestrian); *Teague v. National Railroad Passenger Corporation*, 708 F. Supp. 1344 (D. Mass. 1989) (employee threatened with job loss if he failed to rule against union members at hearings, and was chastised for reporting safety violations); *Kraus v. Consolidated Rail Corporation*, 723 F. Supp. 1073 (E.D. Pa. 1989), *appeal denied*, 899 F.2d 1310 (3d Cir. 1990) (consolidation of job tasks).

In addition to involving varied and sundry liability fact patterns, FELA emotional injury cases also involve a myriad of injury scenarios. *Carlisle* (major depression and nervous breakdown with attendant symptoms of insomnia, fatigue, headaches, sleepwalking and weight loss); *Ray* (mental breakdown); *Elliot* (mental distress with attendant symptoms of dizziness, weakness, faintness, stuttering, crying, and headaches); *Holliday* (spastic colon, nightmares, anxiety, depression, involuntary rectal discharge); *Adams* (emotional breakdown and institutionalization); *Gaston* (post-traumatic stress disorder); *Stoklosa* (chest pain, fatigue, depression); *Pierce* (fatal heart attack); *Robert* (non-fatal heart attack); *Halko v. New Jersey Transit Rail Operations, Inc.*, 677 F. Supp. 135 (S.D.N.Y. 1987) (suicide).

The state courts' experience with non-FELA cases makes clear the futility of attempting rigid or static "tests" by which to measure emotional injury claims. Such paradigms have invariably proven too narrow and requiring of constant revisitation and revision. The Third Circuit's analysis in *Gottshall* of the history of emotional injury law in Pennsylvania is instructive. (A-60 to A-61, n.8). Before 1970, Pennsylvania applied the "physical impact" rule with "obstinate rigidity." Then, in *Niederman v. Brodsky*, 436 Pa. 401, 261 A.2d 84 (1970), the Pennsylvania Supreme Court adopted the more inclusive "zone of danger" test, only to change its mind again nine years later and adopt the "bystander rule" of recovery in *Sinn v. Burd*, 486 Pa. 146, 404 A.2d 672 (1979). This unfortunate affinity for drawing and then redrawing lines in the sand has been shared by most other jurisdictions as well, with the result that, " '[t]he case law in the field [of emotional distress] is in an unparalleled state of confusion and any attempt at a consistent exegesis of the authorities is likely to break down in embarrassed complexity.' " *Carlisle v. Consolidated Rail Corporation*, (A-79)(quoting Annotation, *Right to Recover for Emotional Disturbance or its Physical Consequences, in the Absence of Impact or Other Actionable Wrong*, 64 A.L.R.2d 100, 103 (1959) (footnotes omitted)). There is some indication, however, that the state courts are finally beginning to free themselves of their artificial tests, albeit begrudgingly. *See Leong v. Takaski*, 520 P.2d 758, 55 Haw. 398, 403 (1974) (" . . . the trend is a hesitant abandonment of such artificial restrictions and barriers to recovery in favor of a greater reliance on general tort law principles and the contemporary sophistication of the

medical profession to test the veracity of claims for relief").

Closing its eyes to the confusion created by the state courts as they have haphazardly traded in one "carefully drawn" test after another, petitioner here seeks the opportunity to persuade this Court to devise its own test in order to afford this area of federal law a "uniform approach." (Petition at 12). As the Third Circuit Court of Appeals stated in *Gottshall*, however:

> Although a fact-specific analysis may mean losing the comfort and security that bright-line, arbitrary rules afford, FELA jurisprudence cannot be reduced to a set of rules that mechanistically drive results without exacting scrutiny of the facts as they bear upon such considerations as the employer's duty to provide a safe workplace, the nature of the alleged tortious conduct, the injury, and the underlying equities.

(A-35). However tantalizing, a "green is go, red is stop" rule simply will not accommodate FELA litigation.

In addition to proving fruitless, any attempt to bind the lower courts with narrow mechanistic tests in this area would contravene the broad remedial goal of the FELA and the Act's intent to vest the courts with authority to expand the Act's coverage as the state of law develops. This Court has recognized the FELA as a broad, remedial act and has adopted a " 'standard of liberal construction in order to accomplish [Congress'] objects.' " *Atchison, Topeka & Santa Fe Railway Co. v. Buell*, 480 U.S. at 562 (1987), *quoting Urie v. Thompson*, 337 U.S. 163, 180 (1949). Consistently, this Court has expressly refused to

read restrictions into the Act or otherwise stall the development of FELA jurisprudence. *Urie v. Thompson*, 337 U.S. at 181. As this Court stated in *Urie*:

> To read into this all-inclusive wording [of FELA] a restriction as to the kinds of employees covered, the degree of negligence required or the particular sorts of harms inflicted, would be contradictory to the wording, the remedial and humanitarian purpose, and the constant and established course of liberal construction of the Act followed by this court.

337 U.S. at 181-82, *quoted in Gottshall v. Consolidated Rail Corporation*, (A-29). In *Kernan v. American Dredging Co.*, 355 U.S. 426 (1958), where this Court extended the negligence *per se* doctrine beyond common law limitations, the Court importantly recognized that, "Congress did not intend to create a static remedy, but one which would be developed and enlarged to meet the changing conditions and changing concepts of industry's duty toward its workers." 355 U.S. at 431. In other words, "Congress left the onus of fashioning remedies to the courts in a manner analogous to the development of common law tort remedies." *Gottshall v. Consolidated Rail Corporation*, (A-25).

The last reason this Court should not bind the lower courts with a test against which to measure the legal sufficiency of emotional injury cases under the FELA is, simply, that such a test is unnecessary; the existing common law tort requirements of duty, breach, foreseeability and causation, coupled with the lower courts' sensitivity to the policy reasons against too broad a remedy, have already proven sufficient devices by which to separate

the wheat from the chaff. The history in the Third Circuit is particularly illuminating. Before the Third Circuit's decision in *Gottshall*, that court reviewed two other claims of emotional distress brought under the FELA. *Outten v. National Railroad Passenger Corporation*, 928 F.2d 74 (3d Cir. 1991); *Holliday v. Consolidated Rail Corporation*, 914 F.2d 421 (3d Cir. 1990), *cert. denied*, 498 U.S. 1090 (1991).

In *Holliday*, the plaintiff was required to work over his objections as a conductor along a particular area of track where he did not feel qualified to operate. Though his asserted inadequacy did not result in an accident, the plaintiff claimed he often threw the wrong switches and once was almost crushed during a switching operation. According to the plaintiff, all of this caused him stress and he started to experience a number of disorders, including heart palpitations, sleep disorders, nightmares, spastic colon, anxiety and depression. In evaluating the legal sufficiency of the plaintiff's claim, the Third Circuit followed this Court's lead in *Buell* and focused its attention on the " 'nature of the injury and the character of the tortious activity.' " 914 F.2d at 423, *quoting Buell*, 480 U.S. at 568. Affirming the district court's grant of summary judgment in favor of the railroad, the Third Circuit emphasized that the plaintiff's claim arose solely as a result of everyday job stresses and resulted in no physical injuries whatsoever, either to the plaintiff or to anyone else. The *Holliday* court expressed its concern that, "if we hold that a railroad employee demonstrating some possible negligence with psychological consequences will always present a jury question in a FELA action, the most attenuated claims could be advanced." 914 F.2d at 427.

The following year, in *Outten v. National Railroad Passenger Corporation, supra* the Third Circuit was faced with a claim brought by a railroad tamper operator who allegedly suffered emotional injuries after a passenger train was involved in a collision a mile from where he was working. Though the plaintiff did not witness the collision, was not injured in the collision and did not see the resulting injuries to passengers, none of whom was related to him, he claimed to have feared for his life. Affirming summary judgment in favor of the railroad, the Third Circuit cited its previous opinion in *Holliday* as making clear the policy reasons warranting a cautious approach in enlarging recovery for emotional injuries under the FELA, *to wit*, the need to prevent fraudulent claims, "incalculable and potentially unlimited damages" and a "flood of litigation." 928 F.2d at 77. Declining to "fashion a new rule for FELA cases so that a railroad employee can recover for purely emotional injuries provided that he or she reasonably feared personal physical injury," 928 F.2d at 79, or any other "litmus test for FELA claims based on negligent infliction of emotional distress," *id.*, the Third Circuit refused to recognize the plaintiff's claim because it could find "no solid basis" in common law to support it. *Id.*

As the Third Circuit made clear in *Gottshall*, its decisions in *Holliday* and *Outten* were based upon its recognition of the "strong policy reasons preclud[ing] finding liability for 'every possible distressful happening to which a railroad worker is exposed.'" (A-57)(quoting *Outten*, 928 F.2d at 79). As explained in *Gottshall*:

> This policy simply echoes the belief that frivolous claims for trivial emotional disturbances

> and bruised feelings that are ordinary and expected as part of daily life, such as stress from the ordinary conditions of the workplace, are not cognizable. *To this end, the proper limits on liability are those fixed by generally applicable principles of tort law.*

(A-57) (emphasis added).

Applying the tort law principles referred to by the *Gottshall* Court, other courts have routinely dismissed claims of emotional distress brought pursuant to the FELA. In *Robert v. Consolidated Rail Corporation, supra*, the First Circuit affirmed summary judgment against a plaintiff claiming he had suffered an off-the-job heart attack as a result of on-the-job harassment. The basis of the court's decision was that the undisputed factual record "fail[ed] to establish an essential element of negligence," *to wit*, reasonable foreseeability. 832 F.2d at 5 (emphasis omitted). Taking guidance from this Court, the First Circuit held that, "the essential ingredient of FELA negligence is the reasonable foreseeability of harm to plaintiff." *Id., citing Harrison v. Missouri Pacific Railroad Co.*, 372 U.S. 248 (1963). In the case before it, the First Circuit found no basis for finding that the defendant either knew or should have known of the possibility that its conduct toward the plaintiff would cause him to suffer a heart attack. The plaintiff had not suffered any symptoms before the actual heart attack and had never complained to the defendant about the alleged harassment or that it caused him stress. *See also Stoklosa v. Consolidated Rail Corporation*, 864 F.2d 425 (6th Cir. 1988) (affirming summary judgment where it was not reasonably foreseeable that legitimate disciplinary action could result in the

extreme reaction asserted by the plaintiff); *Plaisance v. Texaco, Inc.*, 966 F.2d 166 (5th Cir. 1992) (rehearing en banc) (court dismissed plaintiff's claim on the grounds that plaintiff's injuries were not reasonably foreseeable).

In *Adams v. CSX Transportation, Inc.*, 899 F.2d 536 (6th Cir. 1990), the plaintiff claimed to have suffered an emotional breakdown after being harassed by an abusive supervisor during a time period in which plaintiff already was under stress as a result of an acrimonious divorce and a bankruptcy proceeding. Affirming the trial judge's denial of plaintiff's claim, the Sixth Circuit found the claim to be "fatally flawed" because plaintiff failed to establish either a breach of the employer's duty to provide an emotionally safe workplace or that the injuries flowing from defendant's actions were foreseeable. 899 F.2d at 539, *relying on, inter alia, Robert v. Consolidated Rail Corporation*, 832 F.2d 3, 6 (1st Cir. 1987) (FELA plaintiffs are required to "prove the traditional common law elements of negligence: duty, breach, foreseeability, and causation"). On the issue of foreseeability, the court noted that the railroad could not have foreseen plaintiff's emotional reaction to his supervisor's conduct where the plaintiff actually selected a job which increased his exposure to the supervisor and had never complained about the supervisor to the railroad. *Id.*

In *Moody v. Maine Central Railroad Company*, 823 F.2d 693 (1st Cir. 1987), the plaintiff claimed to have suffered fatigue, depression and angina as a result of harassment in the form of denying his admission into an engineer training program, assigning him to undesirable locations and denying him qualification to work trains on certain runs. Relying on *Celotex Corporation v. Catrett*, 477 U.S.

317 (1986) (summary judgment mandated against party unable to establish an essential element as to which the party bears the burden of proof), the First Circuit found no competent evidence on the record establishing causation between plaintiff's injuries and the claimed harassment, and affirmed summary judgment for the railroad.

II. IN CONSTRUING THE FELA IN *GOTTSHALL*, THE THIRD CIRCUIT PROPERLY ADHERED TO THE *BUELL* DECISION AND BASED ITS DECISION ON AN EXACTING SCRUTINY OF THE CIRCUMSTANCES INVOLVED AND COMMON LAW DEVELOPMENTS.

As discussed above, this Court in *Buell* declined to impose a bright-line rule or test by which to measure emotional distress cases brought under the FELA. Instead, the *Buell* decision left it to the courts to weigh such claims on a case-by-case basis based upon an exacting scrutiny of the facts and with a view to common law developments. In reaching its decision in *Gottshall*, the Third Circuit took the *Buell* pronouncements to heart.

The Third Circuit began its decision in *Gottshall* by reviewing in detail the circumstances surrounding Gottshall's emotional collapse, including the death of Gottshall's co-worker and friend, Richard Johns, the extreme weather conditions and relentless work pace that caused Johns' death, Gottshall's exposure to those same weather and working conditions both before and after Johns' death, Conrail's own cavalier reaction to Johns' death, and Gottshall's involvement in Johns' death. (A-2 through A-6). Then, citing *Buell*, (A-8, 9), the court of appeals undertook a review of state common law relating

to emotional distress claims, discussing the minority "physical impact" rule, the "zone of danger" and "physical manifestation rules" followed by a majority of the state courts, and the "bystander rule" followed in many other jurisdictions. (A-9 through A-11). The court of appeals noted that these tests are "as different as they are arbitrary" and pointed out that, though the tests were developed to "screen causes of action and send only the meritorious ones to juries," their unfortunate by-product was to preclude recovery for many meritorious claims. (A-11).

After its review of state common law relating to emotional injury claims, the court of appeals surveyed FELA emotional distress decisions by the other circuit courts, (A-12 through A-21), and then discussed its own post-*Buell* decisions. (A-22 through A-24). The Third Circuit explained its decisions in *Holliday* and *Outten* as reflecting its refusal either to construct its own litmus test or to designate any particular state common law test as *the* test in the circuit, (A-22, 23), stating that, "[b]ecause claims for negligent infliction of emotional distress are so fact-dependent, we declined to make broad pronouncements that could restrict future meritorious claims." (A-22).

Recognizing a tension between the fear of fraudulent and frivolous claims underlying existing common law emotional injury tests and the FELA's own liberal policy in favor of recovery, the court of appeals charged itself with reconciling that tension by, "discerning the trends and developments in common law and then gauging them according to the policy underlying FELA, for FELA is at issue here and creates the cause of action." (A-24).

The Third Circuit then discussed Congress's fashioning of the Act in general rather than specific terms in order to empower the courts to fashion remedies in a manner analogous to the development of common law, along with this Court's recognition of congressional intent to create a dynamic remedy which would be developed and enlarged to meet changing conditions. (A-25)(citing *Kernan v. American Dredging Co.*, 355 U.S. 426, 431-33 (1958)). The court of appeals also noted FELA's well-established departures from common law, including the Act's eradication of many traditional common law impediments to recovery such as contributory negligence and assumption of risk defenses and its relaxation of the causation requirement. (A-26 through A-30)(citing, *inter alia*, *Atchison, Topeka and Santa Fe Railway Co. v. Buell*; *Kernan v. American Dredging Co.*; *Sinkler v. Missouri Pacific Railroad Co.*, 356 U.S. 326 (1958); *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500 (1957); and *Urie v. Thompson*, 337 U.S. 163 (1949)). Recognizing that "FELA liability and common law liability are thus different," the court of appeals reached the obvious, "inexorable conclusion" that, "[s]tate law tests are not the *sine qua non* for determining whether plaintiff has a cognizable FELA claim and doctrinal common law distinctions are to be discarded when they bar recovery on meritorious FELA claims." (A-30).[7]

[7] Citing *Teague v. National Railroad Passenger Corporation*, 708 F. Supp. 1344, 1348 n.5 (D. Mass. 1989), the court of appeals pointed out that federal court reliance on state court tests in evaluating FELA emotional distress claims could result in, "the federal courts in the fifty states producing as many as fifty versions of what should be unified federal law." (A-30).

Reviewing in detail the anti-fraud policy underlying the state court tests (A-31 through A-34), the court of appeals concluded that the best way to enforce that policy is through an active scrutiny of the facts (A-35). The court of appeals then proceeded to weigh the circumstances of Gottshall's claim, finding those circumstances to satisfy the "physical manifestation" test (A-42), the "active participation" rule (A-40) and the principles underlying the "bystander theory." (A-36 through A-40). Having so found, the court of appeals held that Gottshall had "sufficiently shown that his injuries are genuine and severe to create a genuine issue for the jury to decide." (A-44).

Because Gottshall had passed this "threshold burden," the court of appeals proceeded to evaluate his claim against the FELA's requirements of breach of duty, injury and causation. Relying on this Court's opinion in *Inman v. Baltimore & Ohio Railroad Co.*, 361 U.S. 138, 140 (1959), the court of appeals held that negligence in the context of emotional injuries requires, as it does with physical harm, "a foreseeable risk of injury and conduct unreasonable in proportion to the danger." (A-44). Applying that standard to the facts before it, the court of appeals concluded that a reasonable employer would have foreseen the risks associated with the adverse weather conditions, the age and physical condition of the men and petitioner's forcing the men to work at an accelerated pace without adequate breaks. (A-49). Moreover, because several of the men had actually complained to their supervisor about the conditions, there was evidence that petitioner had actual knowledge of the danger. (A-49, 50).

The court of appeals found a genuine issue as to whether Gottshall sustained cognizable *injury*. (A-55). As a result of his trauma, Gottshall exhibited objective, physical symptoms and had to be institutionalized for three weeks. Three doctors diagnosed Gottshall as suffering from severe post-traumatic stress syndrome. Finally, the court of appeals found sufficient evidence to create an issue whether petitioner's negligence "played any part, however small," in causing that injury. (A-55) (quoting *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. at 508).

In concluding its opinion, the Third Circuit in *Gottshall* expressly recognized that, "even under the liberal recovery policy under FELA, the employer is not the insurer of the worker's safety" (A-56), and agreed that strong policy reasons warrant against imposing liability for " 'every possible distressful happening to which a railroad worker is exposed.' " (A-57) (quoting *Outten*, 928 F.2d at 79). However, the court of appeals concluded that the proper limits on liability in the context of emotional injury claims are those fixed by the general tort law principles of duty, foreseeability and causation. Though reiterating its own previous recognition of the potential for "incalculable and potentially unlimited damages, floods of litigation, and fraud," the court of appeals cautioned that, "these concerns cannot become the incantations by which railway attorneys make all plaintiff's claims disappear." (A-59).[8]

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[8] The court noted that in the five plus years since *Buell*, the courts of appeals have reported a total of eighteen cases involving emotional distress claims under the FELA. (A-62). As the court of appeals noted, this is hardly a "flood" of litigation. *Id.*

Finally, the court of appeals took pains to "spell out" that it was not holding that a cause of action will arise whenever a railroad makes its men work in hot weather, or pushes them to perform hard labor, or whenever a railroad worker witnesses an injury or death while on duty. (A-63). Rather, the court made clear that its opinion was based on "the totality of these extreme facts." (A-64).

III. THE GOTTSHALL CASE TURNS ON ITS PARTICULAR FACTS AND THERE ARE NO SPECIAL OR IMPORTANT REASONS FOR GRANTING CERTIORARI.

This Court has consistently held that it does not "grant certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925). Because the court of appeals expressly based its decision in *Gottshall* on a scrutiny of the specific facts before it, granting certiorari here would violate that rule. Additionally, due to the narrow and specific holding of the court of appeals, including its express refusal to adopt any rules of law, the decision in *Gottshall* is of importance solely to the litigants, and there are otherwise no special or important reasons warranting the exercise of this Court's discretionary power of review.

CONCLUSION

For the foregoing reasons, respondent James E. Gottshall respectfully requests this Court to deny the petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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Dated: June 29, 1993